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In the Supreme Court of the United States

OCTOBER TERM, 1995

DR. BEN BRANCH, TRUSTEE OF BANK OF NEW ENGLAND CORPORATION, ON BEHALF OF AND IN THE NAME OF MAINE NATIONAL BANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Deposit Insurance Corporation's exercise of its statutory powers to assess liability against a national bank for losses to the Corporation arising out of the failure of a commonly owned insured depository institution constitutes a taking of property for which just compensation is constitutionally mandated.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 69 F.3d 1571. The opinion of the United States Court of Federal Claims (Pet. App. 38a-60a) is reported at 31 Fed. Cl. 626.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1995. Pet. App. 24a-25a. A petition for rehearing was denied on February 7, 1996. Pet. App. 61a-62a. The petition for a writ of certiorari was filed on May 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the application of the "cross-guarantee provision" of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 100-73, § 206(a)(7), 103 Stat. 201-205. That provision makes "[a]ny [federally] insured depository institution * * * liable for any loss incurred by the [Federal Deposit Insurance] Corporation, or any loss which the Corporation reasonably anticipates incurring * * * in connection with * * * the default of a commonly controlled insured depository institution." 12 U.S.C. 1815(e)(1)(A).[1] The cross-guarantee provision thus permits the FDIC to recover a loss due to the closing of a federally insured financial institution by "seek[ing] reimbursement from other insured financial institutions in the same holding company." 135 Cong. Rec. S4279 (daily ed. Apr. 19, 1989) (statement of Sen. Riegle).

2. Maine National Bank (MNB) was a national bank headquartered in Portland, Maine. In 1985, MNB was acquired by Bank of New England Corp. (BNEC). BNEC was a regional bank holding company that also owned Bank of New England, N.A. (BNE), a large Boston-based national bank, and Connecticut

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[1] The FDIC is charged with insuring deposits at federally insured institutions up to a limit of $100,000 per depositor. 12 U.S.C. 1821(a)(1). In carrying out its responsibilities, the agency currently administers two funds: the Bank Insurance Fund, used to insure deposits at participating commercial banks, and the Savings Association Insurance Fund, used to insure deposits at participating savings and loan institutions. See 12 U.S.C. 1821(a)(5) and (6); 12 U.S.C. 1817(*l*). The Bank Insurance Fund is supported by annual assessments on its member banks, which include all national banks. See 12 U.S.C. 1817(b).

Bank & Trust, N.A. (CBT), a national bank based in Hartford, Connecticut.

In the late 1980s, as a result of an economic downturn in the New England economy, BNE's financial condition deteriorated. Despite the remedial efforts of bank management and government banking regulators, BNE's condition worsened. In early January 1991, with the public announcement that BNE anticipated a fourth-quarter 1990 loss of approximately $450 million, BNE and CBT experienced substantial deposit outflows that threatened an immediate liquidity crisis. See generally *The Failure of the Bank of New England: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs*, 102d Cong., 1st Sess. 9-11 (1991) (testimony of Comptroller of the Currency Robert L. Clarke). On Sunday, January 6, 1991, the Comptroller declared BNE and CBT insolvent and appointed the FDIC as their receiver. *Id.* at 11.

The same day, pursuant to FIRREA's cross-guarantee provision, the FDIC served MNB with a Notice of Assessment of Liability in the amount of $1,015,900,000—the agency's estimate of the loss it would incur as the result of BNE's failure. Because MNB was unable to pay the assessment, the Comptroller declared MNB insolvent, and appointed the FDIC as its receiver. On January 7, BNEC, the holding company for the three banks, filed for bankruptcy. See generally Pet. App. 3a, 41a.

In order to continue the operations of the three insolvent institutions, the FDIC transferred most of their assets to three federally chartered "bridge" banks. Pet. App. 3a, 41a. Most of the assets of the

bridge banks were subsequently sold to subsidiaries of Fleet/Norstar Financial Group, Inc. *Ibid.*[2]

3. Petitioner, who was appointed BNEC's trustee in bankruptcy, sued the United States on MNB's behalf, asserting that the notice of assessment and consequent closure of MNB was a taking of property for which the Constitution mandates just compensation. The Court of Federal Claims denied the parties' cross-motions for summary judgment, but held that, unless BNEC and MNB had not operated in accordance with their separate corporate forms, the government's actions would constitute a taking. Pet. App. 60a.

The court of appeals reversed. The court first held that MNB's placement in receivership upon the Comptroller's determination that the bank was insolvent did not effect a constitutionally compensable taking. Pet. App. 6a. As the court observed, just as the government's seizure of private property for failure to pay a tax liability or civil penalty would not constitute a taking (*id.* at 8a), "[i]t is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver to take control of the bank's assets." *Id.* at 6a. That is because "[b]anking is a highly regulated industry, and

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[2] With Fleet/Norstar's purchase of assets of the BNE bridge bank, the FDIC's assessment of loss was reduced to $501 million. See Pet. App. 74a. More definite financial data reduced the estimate of total loss to $477 million. See *id.* at 75a. And when the FDIC served a notice of assessment of liability on CBT of $378,015,000 for its allocable share of the loss attributable to the BNE failure, MNB's cross-guarantee assessment was further reduced to $98,985,000 (see *id.* at 76a)—still far more than the approximately $65 million that MNB alleges it had in book equity on the date of its closing. See Pet. 6 n.8.

an individual engaged in that industry is deemed to understand that if his bank becomes insolvent or is operated in violation of laws or regulations, the federal government may 'take possession of its premises and holdings'" without compensation. *Ibid.* (citation omitted).

The court of appeals then held that the cross-guarantee assessment also did not constitute a taking. The court rejected petitioner's contention that the assessment was a "per se" taking because it physically appropriated MNB's property or because it rendered MNB insolvent. The court of appeals observed that this Court has never treated monetary exactions under a *per se* theory, and that it would be "perverse" to hold that the imposition of liability is a *per se* taking "as to any party that cannot pay it." Pet. App. 9a-10a.

The court also held that the cross-guarantee assessment was not a regulatory taking under the three-factor test outlined in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), and reaffirmed in *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993). The court observed that the government's actions arise from "a public program that adjusts the benefits and burdens of economic life to promote the common good." Pet. App. 14a (quoting *Connolly*, 475 U.S. at 225). The court found that cross-guarantee liability was a reasonable way of "allocat[ing] the financial burden of bank failures," since it "burden[s] related institutions for the failure of their sister banks rather than visiting those costs on unrelated banks (through increases in deposit insurance premiums) or on taxpayers in general." Pet. App. 16a. The court also observed that

MNB's reasonable investment-backed expectations were "greatly reduced" because banking has long been a highly regulated business. *Id.* at 18a. Specifically, "the historical practices in the bank regulatory field, including the exceptions to the principle of limited liability created by statute, regulation, and regulatory policy," made it "unreasonable for [MNB's] owners * * * to expect that the bank's assets would never be subject to liability based on losses suffered by other members of the BNEC system." *Id.* at 21a.

ARGUMENT

1. Only one other court of appeals has addressed the issue presented in this case, and it reached the same result as the court below. In *Meriden Trust & Safe Deposit Co.* v. *FDIC*, 62 F.3d 449 (1995), the Second Circuit rejected a bank's argument that the FDIC cross-guarantee assessment—which, as here, rendered the bank insolvent—constituted a taking of its property without just compensation. The court emphasized that, because the bank and its sister institution "presumably reaped benefits from joint ownership in the first instance," the assessment "was in keeping with the economic reality of the relationship" between their common holding company and each other. *Id.* at 455. Moreover, the cross-guarantee provision "did not significantly disrupt any reasonable investment-backed expectations" since the bank did business in a regulated field. *Ibid.*[3]

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[3] The court also held that the bank's taking claims were precluded on the ground that the bank had chosen to remain an insured institution after the cross-guarantee statute had been enacted, thereby "voluntarily subjecting itself to a known obligation." 62 F.3d at 455. The court emphasized, however,

Petitioner contends that the "approach" and "analytical framework" (Pet. 11) of the decision below conflict with the reasoning contained in various takings decisions of this Court and other courts. But the decisions petitioner cites—which, for the most part, involved land use determinations, where property expectations are more firmly fixed—lie far afield from the present case. With one exception, which supports rather than contradicts the decision below,[4] none of these cases involved takings claims in banking or any other highly regulated industry, and none of them dealt with anything remotely resembling a cross-guarantee assessment.

2. a. The decision below is also correct on the merits. As an initial matter, the court of appeals correctly rejected petitioner's claim that enforce-

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that it would have reached the same result, for the reasons noted in the text, even if the bank had been "compelled to maintain its insured status." *Ibid.*

[4] In *Colorado Springs Prod. Credit Ass'n* v. *Farm Credit Admin.*, 967 F.2d 648 (D.C. Cir. 1992), the court rejected takings claims by a number of production credit associations (PCAs) that had been required by statute to contribute capital to a government corporation established as part of a plan to rescue the government-supported Farm Credit System (of which the PCAs were a part). The court held that, because "the PCAs derived benefit from the Act roughly commensurate with the burdens they were forced to bear," *id.* at 655, there was no need to define the contours of the PCA's investment-backed expectations. *Id.* at 655 n.8; accord *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989); see also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980) (invalidating county's appropriation of interest accruing on interpleader fund deposited in registry of county court where such exaction was "not reasonably related to the costs of using the courts"). As discussed below, see pages 11-13, *infra*, a similar analysis supports the decision below.

ment of the cross-guarantee assessment constitutes a *per se* taking of MNB's property. Only where there has been a "permanent physical occupation" of tangible property, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982), or where regulation denies an owner "all economically beneficial or productive use of land," *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), will regulatory action be found to require compensation "without case-specific inquiry into the public interest advanced in support of the restraint." *Ibid.*

Here, the FDIC's assessment required MNB to pay a sum of money. An order to pay money is not compensable *per se* as a physical appropriation, since, "[u]nlike real or personal property, money is fungible." *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); accord *Atlas Corp.* v. *United States*, 895 F.2d 745, 756 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990); see also *Colorado Springs Prod. Credit Ass'n* v. *Farm Credit Admin.*, 967 F.2d 648, 657 (D.C. Cir. 1992). Any contrary principle would constitute "an extravagant extension" of this Court's precedent. *Sperry*, 493 U.S. at 62 n.9.

MNB was declared insolvent, and was placed in receivership, because it was unable to pay the assessment. But the bank's inability to pay did not transform this monetary assessment into a physical appropriation of property, nor did it trigger the rule requiring compensation for regulations that necessarily deny all economically beneficial use of property. As the court of appeals observed, "[i]t would be perverse to hold that a statute resulting in a $99 million liability would be constitutional as applied to any member of the BNEC system having a net worth of more than $100 million but unconstitutional *per se*

as to any member having a net worth of less than $100 million." Pet. App. 10a.

b. Where, as here, government action does not amount to a *per se* taking, there is no "set formula" for determining whether compensation is constitutionally required, and the inquiry "depends largely 'upon the particular circumstances'" of each case. *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978); accord *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984). Three factors are particularly relevant to this inquiry: (1) "the nature of the governmental action," (2) "the severity of the economic impact," and (3) "the degree of interference with * * * 'reasonable investment-backed expectations.'" *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643-645 (1993); accord *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986).

Although the impact of the cross-guarantee assessment on MNB was undoubtedly substantial, the nature of the government's action and the lack of any significant interference with the bank's reasonable investment-backed expectations preclude petitioner's takings claim. The FDIC imposed the cross-guarantee assessment pursuant to a statutory scheme designed to protect the federal deposit insurance funds, which are an integral portion of the federal safety net for financial institutions. Any effect on MNB's property interests accordingly "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225.

Petitioner contends, to the contrary, that the assessment was a "targeted exaction[]" (Pet. 17) to "the government itself" (Pet. 15-16) (emphasis omitted).

See Pet. 22-26. That characterization is incorrect. The cross-guarantee statute does not target MNB for special treatment, but establishes a liability that applies across the board to "any" commonly owned and federally insured depository institution. 12 U.S.C. 1815(e)(1)(A). Nor does the assessment directly increase the amount of federal funds available for general government obligations; rather, it represents a means of reimbursing the industry-wide federal deposit insurance program for losses caused by bank failures. In the same way that the "immediate effect" of the ERISA withdrawal liability provisions upheld in *Connolly* and *Concrete Pipe* was to minimize the loss to the government's pension insurance fund, the "ultimate purpose of the legislation" at issue here "is to protect private parties and to make the pertinent insurance system self-sufficient by increasing the burden on participants in the system." Pet. App. 15a.

Moreover, petitioner suffered no significant interference with "reasonable investment-backed expectations." *Concrete Pipe*, 508 U.S. at 645. Those doing business in a field already governed by a comprehensive scheme of government regulation "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227 (quoting *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958)). In this case, "[b]anking is one of the longest regulated and most closely supervised of public callings." *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947). As a national bank established under a federal charter and providing services under a long-standing and detailed scheme of federal regulation, MNB's reasonable expectations necessarily included the likelihood that Congress

would amend the governing rules to address emerging or recently perceived harms.[5]

Here, Congress sought, through the cross-guarantee provision, to address problems of bank regulation arising from the operation of holding companies that own more than one insured depository institution. Before enactment of the provision, the holding company form gave management the power to concentrate risky activities in a single bank subsidiary, so that if that subsidiary failed, the loss would be borne by federal deposit insurance funds, rather than by the affiliated entities.[6] By deeming related banks liable

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[5] In places, petitioner seems to suggest that prior law gave MNB an absolute right not to be called upon to make good the deposit insurance losses resulting from the failure of its corporate siblings. Pet. 14, 20. Petitioner's appeal to the common law principle of limited corporate liability is unavailing, however, since, as this Court long ago recognized, "[a] person has no property, no vested interest, in any rule of the common law." *Munn* v. *Illinois*, 94 U.S. 113, 134 (1876). In addition, as the court of appeals found, principles of limited corporate liability have often been modified in the context of bank regulation. Pet. App. 21a. In light of the historical record, therefore, "it would have been unreasonable" for MNB's owners to have expected "that the bank's assets would never be subject to liability based on losses suffered by other members of the BNEC system." *Ibid.*

[6] "By concentrating poorer assets in a single bank, and then letting that bank fail, the bank holding company can shift the cost of those assets—the loss it would otherwise be forced to realize—to the FDIC." *Oversight on the Condition of the Financial Services Industry: Hearings Before the Senate Comm. on Banking, Housing & Urban Affairs*, 100th Cong., 2d Sess. 254-255 (1988) (testimony of FDIC Chairman L. William Seidman). In many cases, affiliated banks in a multi-bank holding company system could support the lending activities of a "lead bank" by depositing funds in, and making unsecured

for losses caused by their corporate siblings, the cross-guarantee provision "reduces the risk that bank holding companies will favor their successful banks and allow their less successful banks to fail," and helps "remov[e] the incentive for bank holding companies to manipulate assets among their subsidiaries in a way potentially damaging to the Bank Insurance Fund." Pet. App. 17a.

Even after enactment of the cross-guarantee provision, bank holding companies and their subsidiaries still "derive great benefits from the ability to conduct business in that form." Pet. App. 16a. For example, a holding company can provide centralized services for its subsidiary banks, thereby creating economies of scale and increasing the operating efficiency of the subsidiary banks. Peter S. Rose, *The Changing Structure of American Banking* 250-253 (1987). The holding company structure also allows the institution to overcome geographical constraints on doing business, such as restrictions on branch banking, and permits the shareholders of a subsidiary bank to use the bank's funds for investment in other areas without adverse tax consequences. Robert C. Clark, *The Regulation of Financial Holding Companies*,

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loans to, that bank. *Condition of the Federal Deposit Insurance Funds: Hearings Before the House Comm. on Banking, Finance & Urban Affairs*, 100th Cong., 1st Sess. 354 (1988) (testimony of Chairman Seidman). Moreover, holding company management could funnel poor or underperforming assets from healthy to troubled subsidiary banks. See *In re First City, Texas—Austin, National Association*, 2 FDIC Enf. Dec. & Orders ¶ 5209, at A-2371, A-2374 (1993) ("Good assets of a prob-lem bank can be sold to affiliated banks at less than full value, and bad assets of a healthy bank can be transferred to a prob-lem bank for more than full value.").

92 Harv. L. Rev. 787, 816-819 (1979). Finally, pursuant to the sister bank exemption contained in Section 23A of the Federal Reserve Act, 12 U.S.C. 371c(d)(1)(C), a bank that is at least 80% owned by a holding company may engage in various transactions with similarly owned affiliated banks, including lending and investing money, purchasing assets, and executing guarantees, without being subject to otherwise applicable quantitative restrictions.

The cross-guarantee requirement is a reasonable and constitutional price for banks to pay for the right to conduct their business within the holding company form. The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Fairness and justice do not require the banking industry as a whole—and, derivatively, the general public—to bear the costs associated with bank failures before commonly controlled institutions have contributed their share to cover those costs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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